BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY McFERRIN	)	
Claimant	)	
V.	)	Docket No. 1,052,121
	)	
FEDERAL EXPRESS CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of Administrative Law Judge John D. Clark's January 17, 2014 Review and Modification Award. The Board heard oral argument on June 18, 2014.

APPEARANCES

Phillip B. Slape, of Wichita, appeared for claimant. Anton C. Andersen, of Kansas City, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations.

ISSUES

Claimant was injured on May 24, 2010. He settled his corresponding workers compensation claim, with all future rights left open, on October 12, 2011. He resigned his employment on December 14, 2012, and thereafter sought a work disability award utilizing a review and modification proceeding.

The judge concluded claimant was capable of earning the same or higher wages as on his date of accident, as shown by claimant's return to work at the same wage for over two years before his voluntary resignation. The judge concluded claimant was not entitled to a work disability award.

Claimant requests reversal. Based on *Bergstrom*[1] and *Serratos*,[2] claimant maintains he is entitled to a work disability award regardless of why he is no longer employed by respondent and further that his wage earning capability is irrelevant. Claimant contends he is entitled to a modification of his Award based upon a 66.3% work disability.

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[1] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[2] *Serratos v. Cessna Aircraft Company*, No. 104,106, 2011 WL 2637449 (Kansas Court of Appeals unpublished opinion filed July 1, 2011), *mot. to pub. denied* Sep. 9, 2011.

Respondent maintains the Award should be affirmed. Respondent argues K.S.A. 44-528(a) does not compel a judge to award a work disability, but rather uses permissive and discretionary language such as "may modify [an] award, . . . upon such terms as may be just."[3] While respondent agrees K.S.A. 44-510e controls calculation of a work disability award, it asserts claimant must first convince the judge that modification of the award is justified. Respondent argues modifying claimant's Award is unjust.

The parties also dispute the amount of claimant's average weekly wage and further argue over the value of claimant's post-injury average weekly wage.

The issues for the Board's review are:

1. What is claimant's average weekly wage and his post-injury average weekly wage?

2. Is claimant entitled to review and modification, and if so, what is the nature and extent of his disability?

FINDINGS OF FACT

Claimant worked as a delivery driver for respondent for 29 years, with the last 15 or 16 years in a part-time capacity. He unloaded, scanned and delivered packages, loaded trucks, drove, and filled out log books. On May 24, 2010, he injured his low back. He had conservative treatment and returned to work with no restrictions.

At his attorney's request, claimant was evaluated on March 8, 2011, by George Fluter, M.D., who is board certified in physical medicine and rehabilitation, as well as certified as an independent medical examiner. Dr. Fluter rated claimant as having a 7% impairment to the body as a whole under the AMA *Guides*[4] (hereafter *Guides*), consisting of a 5% impairment based on DRE Lumbosacral Category II (minor impairment), a 1% impairment for right-sided sacroiliac joint dysfunction and a 1% impairment for left-sided sacroiliac joint dysfunction. Dr. Fluter indicated claimant was working his regular duty. Dr. Fluter was not asked to provide claimant any work restrictions and did not provide restrictions.

The judge ordered claimant to be evaluated by Peter V. Bieri, M.D., for a neutral medical evaluation. Dr. Bieri examined claimant on July 12, 2011. Dr. Bieri rated claimant as having a 5% whole person impairment under the *Guides* based on DRE Lumbosacral Category II. Dr. Bieri noted claimant was working his regular duty and had been released without restrictions, which he noted was reasonable, appropriate and consistent.

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[3] See Respondent's Brief (filed March 26, 2014) at 8-11.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides*.

On October 12, 2011, claimant settled this case based on a 5% permanent impairment to the body as a whole, with all rights left open. The parties agreed claimant's average weekly wage was $564.24. Claimant was paid $7,805.74 for permanent partial disability benefits, in addition to having already been paid 13.14 weeks of temporary total disability benefits at the weekly rate of $376.18 in the total amount of $4,944.08. Claimant continued to work without restrictions from the date of his settlement until December 14, 2012, earning the same wages and receiving the same fringe benefits.

Subsequent to his back injury, claimant sustained a right knee injury and a separate injury to his left hand. He settled each claim on a full and final basis.

Claimant testified his continued job duties caused him to have ongoing back problems, including increased pain. He did not seek any medical or chiropractic treatment for his back injury subsequent to the settlement, but he did have perhaps eight or ten "acupressure" treatment sessions at a mall.[5] Claimant testified that after his accident he spoke with his supervisor, Toby Miller, and another manager named Gayle, about needing help lifting packages. He indicated the managers would have a handler or someone help him with packages, and employees knew about his back injury and would offer to help him.

Claimant testified that during the Christmas season, he went from working around 25 hours per week to full-time hours with a full-time route. According to his testimony, this increased his daily number of stops from 10-12 to 50-60. In late-November/early-December, claimant decided to resign from his position due to his injuries not getting better and the approaching Christmas season. His resignation note stated:

> Due to injuries the last couple of years and being old enough to draw pension I have decided to leave Fed Ex after 29 years of service. December 14, 2012 will be my last day! Thanks for everything!![6]

Toby Miller is an operations manager for respondent and was claimant's direct supervisor. Mr. Miller indicated claimant worked without restrictions because employees were not allowed to return to work with restrictions. Mr. Miller denied recalling claimant ever discussing the need to have help lifting at work. He testified claimant returned to the same job with no accommodations and respondent did not assign him help, and if other drivers helped claimant load his truck, it was out of their own kindness.

Mr. Miller testified claimant's job would not typically increase during the Christmas season and because claimant had the highest seniority, he could choose to deliver the out of town stops. Mr. Miller indicated the out of town stops were mostly driving and claimant would have perhaps five stops per day.[7]

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[5] Claimant's Depo. at 39-40.

[6] R.M.H. Trans., Resp. Ex. 1.

[7] See Miller Depo. at 16.

On December 12, 2012, two days before resigning, claimant was evaluated again by George Fluter, M.D. Dr. Fluter did not provide a new rating for claimant's back. However, after being asked by claimant's attorney to provide permanent restrictions for claimant's back and pelvis conditions, Dr. Fluter stated:

> The nature of the impairments associated with these conditions, in my opinion, would support restrictions. In the absence of a formal assessment of his functional capabilities, the following restrictions are recommended with respect to the back and pelvis:
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> 1. Restrict lifting, carrying, pushing, pulling to 50 lbs. occasionally and 20 lbs. frequently (medium level of physical demand).
> 2. Restrict bending, stooping, crouching, and twisting to an occasional basis.[8]

Claimant did not have the permanent restrictions in writing from Dr. Fluter until after his last day worked.

After his retirement from respondent, claimant began working more hours at his used car dealership, M & M Hot Wheels, which he started in 1995 and operated while working part-time for respondent. Claimant testified he is the sole proprietor/only owner of M & M Hot Wheels. He has no employees, but testified his wife helps with the books. Claimant testified the dealership is his only current source of income.

On January 11, 2013, claimant filed an Application for Review and Modification of the Award entered on October 12, 2011, stating he was no longer working for respondent and his disability had increased.

On January 30, 2013, claimant was interviewed by Paul Hardin, a vocational consultant retained by his attorney. Claimant told Mr. Hardin his earnings at M & M Hot Wheels varied, but averaged being $61.15 per week. Mr. Hardin prepared a list documenting claimant's 15 year task history and opined claimant had a 73% wage loss.

On April 11, 2013, claimant was seen at the request of respondent's attorney by Paul Stein, M.D., a board certified neurosurgeon. Claimant complained of discomfort in the lower back with radiation very seldom occurring into either lower extremity, occasional popping in the right knee and constant numbness and tingling in the left fourth and fifth fingers. In addressing claimant's low back complaints, Dr. Stein stated:

> The claimant has likely sustained a chronic lumbar strain or sprain superimposed on degenerative disk disease. There is no evidence of true radiculopathy. He has some persistent discomfort of variable intensity for which he only occasionally takes medication. No ongoing or future medical treatment is anticipated or required for this injury. No permanent activity restrictions are required on a medical basis as no real structural injury was demonstrated.

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[8] Fluter Depo., Ex. 3 at 5.

> The referral letter requested opinions regarding functional impairment using the fourth edition of the AMA Guides. It is my understanding from the patient that his lower back case was settled but I do not have any specific information regarding the settlement basis. In any event, his impairment would be 5% to the body as a whole under DRE lumbosacral category II based upon todays examination.[9]

On May 6, 2013, claimant was interviewed by Steve Benjamin, a vocational consultant retained by respondent. Mr. Benjamin opined that using absence of restrictions from Drs. Bieri and Stein, claimant has no wage loss and, when using the restrictions from Dr. Fluter, claimant could return to the open labor market and earn between $397.60 and $884.80, with an average earning potential of $545.89. According to Mr. Benjamin, claimant told him he earned $6,000 at M & M Hot Wheels in 2012.

Dr. Fluter testified on August 27, 2013. Dr. Fluter testified there was no change in the condition of claimant's back between March 2011 and December 2012. Dr. Fluter indicated he did not provide restrictions in March 2011 because he was not asked to do so, but if he thought claimant was at risk for further injury, he would have provided restrictions. After reviewing Mr. Hardin's task list, Dr. Fluter opined claimant is unable to perform 14 of the 23 nonduplicative tasks for a 61% task loss.

On October 7, 2013, claimant testified regarding his earnings at M & M Hot Wheels. He produced tax records for M & M Hot Wheels for the years 2007-12. Such records list him as the proprietor of the business, without reference to his wife. According to the tax returns, M & M Hot Wheels had a net profit of $27,585 in 2012, a net loss of $2,448 in 2011, a net profit of $24,134 in 2010, a net profit of $2,217 in 2009, a net profit of $9,124 in 2008 and a net loss of $17,324 in 2007.

Claimant testified he sold approximately 25 cars in 2013 for a sales revenue of $38,614.74. As for what he earned at M & M Hot Wheels in 2013, claimant produced a document listing a net income of $3,784.09[10] through August 31, 2013. Claimant testified that his wife prepared the document. He could not explain all of the figures in the document. Claimant acknowledged using his business cell phone and business internet for personal use.

Susan McFerrin, claimant's wife, testified on October 8, 2013. She characterized M & M Hot Wheels as both her and her husband's business. She has kept financial records for the car dealership since its inception. She prepared a document titled "Income Statement"[11] for the first eight months of 2013. She testified the $3,784.09 listed as net

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[9] Stein Depo., Ex. 2 at 6.

[10] We calculate that the figure should be $5,784.09. See Claimant's Depo., Ex. 3.

[11] Susan McFerrin Depo., Ex. 1.

income was actually the gross income because she would still "have to pay taxes on that part."[12] According to Ms. McFerrin, M & M Hot Wheels had to pay $2,831.88 in self-employment tax through August 31, 2013. She testified she did not use IRS instructions for calculating self-employment tax. After being provided the IRS formula for calculating self-employment tax, she calculated the 2013 self-employment tax for M & M Hot Wheels through August 31, 2013, would be $695.65 with a net income of $7,920.52.[13]

Dr. Stein testified on October 8, 2013. Dr. Stein testified when he asked claimant if his condition had changed since he settled his case, claimant stated, "Not much, if anything. I would say I have a little more pain with it, but it's been pretty much the same."[14] Dr. Stein provided no restrictions and recommended no additional treatment. In reviewing Mr. Benjamin's task list, Dr. Stein opined claimant was capable of performing every task. Dr. Stein acknowledged claimant's work caused him some discomfort, but there was no structural injury he could document that would be damaged by claimant performing the work activity, so he placed no restrictions on claimant. Dr. Stein noted it was possible claimant's condition may have improved in the four months after his resignation.

Judge Clark's decision states in part:

> This Court finds that the language of K.S.A. 44-528 is plain and unambiguous. It refers specifically to the authority an administrative law judge has when an application for review and modification has been filed under this section.
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> The Claimant was injured on May 24, 2010, and at his settlement it is reflected that he received temporary total disability benefits at a rate of $376.18 per week for 13.14 weeks. He then returned to work for the Respondent at the same wage and same fringe benefits for an additional 120 weeks until he voluntarily terminated his employment.
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> The Claimant returned to work for the Respondent for over two years after his date of injury; therefore, he is capable of earning the same or higher wages that he did at the time of the accident.
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> This Court finds that the Claimant has not sustained his burden proving that he is entitled to an increase in his work disability and his request for additional benefits is denied.

Thereafter, claimant filed a timely appeal.

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[12] It is unclear from Ms. McFerrin's testimony precisely what she meant. *Id*. at 8.

[13] The Board calculates this figure as $7,920.32.

[14] Stein Depo. at 7.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[15] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[16]

K.S.A. 44-510e(a) states in pertinent part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In terms of computing average weekly wage, K.S.A. 2009 Supp. 44-511(a)(2) indicates in part:

> Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

K.S.A. 44-516 states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

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[15] K.S.A. 2009 Supp. 44-501(a).

[16] K.S.A. 2009 Supp. 44-508(g).

K.S.A. 44-528 states in part:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> (b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[17] If there is a change in the claimant's work disability, then the award is subject to review and modification.[18] "Generally speaking, the same legal principles control a case which arises from a review and modification that apply to an original hearing in a compensation case."[19]

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[17] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[18] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[19] *Hayes v. Garvey Drilling Co.*, 188 Kan. 179, Syl. ¶ 4, 360 P.2d 889 (1961).

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[20] Our appellate courts have held that there must be a change of circumstances, either in a claimant's physical or employment status, to justify modification of an award.[21] The change does not have to be a change in claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,[22] or losing a job because of a layoff.[23]

K.S.A. 2009 Supp. 44-551(i)(1) provides in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2009 Supp. 44-555c(a) provides:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

From July 1, 1993 forward, the Board assumed the de novo review of the district court.[24] Board review of an administrative law judge's order is de novo on the record.[25] "The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made."[26] De novo review is review of an existing decision and agency record, with independent findings of fact and conclusions of law.[27]

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[20] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[21] *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

[22] *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

[23] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

[24] See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

[25] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[26] *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009) ("[D]e novo review . . . [gives] no deference to the administrative agency's factual findings.").

[27] *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009); see *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

ANALYSIS

1. Claimant's average weekly wage, including discontinued fringe benefits, is $815.43. His post-injury average weekly wage is $228.19.

At claimant's October 12, 2011 settlement, the parties stipulated claimant's average weekly wage on the date of his injury was $564.24. Claimant now wants the value of his fringe benefits added to such figure. Respondent contends claimant already stipulated to his average weekly wage and cannot include the value of the fringe benefits.

Claimant's employer-provided fringe benefits ended on January 1, 2013. The weekly value of such benefits was $251.19.[28]

The value of employer-provided fringe benefits cannot be added until discontinued. Claimant could not have had a higher average weekly wage for his date of injury when he settled his case with all rights open. He could not have stipulated to a higher wage. Now that claimant is no longer employed for respondent, the value of his employer-provided fringe benefits must be included in his wage based on the required "recomputation" noted in K.S.A. 2009 Supp. 44-511(a)(2). The value of such employer-provided benefits is $251.19 and, when added to claimant's previously agreed-upon average weekly wage of $564.24, his recalculated average weekly wage is $815.43.

The greater weight of the credible evidence shows claimant has a post-injury average weekly wage of $228.19. Such figure is based on M & M Hot Wheels having a 2013 profit of $7,920.32 through August 31, 2013, a period of 34.71 weeks. Dividing $7,920.32 by 34.71 weeks equals $228.19.

2. Claimant is entitled to a 36% work disability based upon review and modification of his original Award.

The Board concludes claimant is entitled to modification of his Award, such that he receives permanent partial disability benefits based on a 36% work disability.

Bergstrom[29] states:

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785, 189 P.3d 508.

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[28] See Benjamin Depo. at 25-26.

[29] *Bergstrom, supra* fn. 1 at 607-08.

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The Kansas Supreme Court further stated:

> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[30]

In *Serratos*,[31] a worker who previously received an award based on his functional impairment was terminated by respondent for cause. Mr. Serratos filed an application for review and modification, seeking a work disability award. His employer argued the plain meaning test from *Bergstrom* required strict construction of K.S.A. 44-528(b) and exploration of his wage earning capacity. The judge found Mr. Serratos had a 100% wage loss and was entitled to a work disability award. The Board affirmed. On appeal, the Kansas Court of Appeals addressed whether review and modification of an award was appropriate based solely on the injured worker having lost his job. The Court explored the interrelationship between K.S.A. 44-510e and K.S.A. 44-528. The Court stated:

> The Board found K.S.A. 44-510e controlled in this matter over the general language of K.S.A. 44-528 and reflected the legislature's most recent expression of its intent on how permanent partial general disability awards should be calculated. This is essentially correct if referring to subsection (b). K.S.A. 44-528(a) sets out the terms to modify a prior award according to the "limitations provided" in the Act. The only way to calculate a change in work disability is by referring to K.S.A. 44-510e(a). Following *Bergstrom*, the Board found Serratos' post-injury wage loss was 100%, and the reasons for Serratos' wage loss were irrelevant. The Board did not err in applying K.S.A. 44-510e(a) to find Serratos' work disability increased, and a modification was justified.

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[30] *Id.* at 609-10.

[31] *Serratos, supra* fn. 2.

> Cessna also argues K.S.A. 44-528 is a special statute because it is the sole statute in the Act addressing modification of prior awards. Accordingly, Cessna contends when a question arises regarding the appropriate standard to apply to review and modification proceedings, K.S.A. 44-528 should control. This argument is raised for the first time in Cessna's reply brief. See *Ortiz v. Biscanin*, 34 Kan. App. 2d 445, 467, 122 P.3d 365 (2004) (An argument asserted for the first time in a reply brief does not conform to Supreme Court Rule 6.05 [2010 Kan. Ct. R. Annot. 44] and will be disregarded.). Regardless, even if K.S.A. 44-528 is a special statute, Cessna ignores the language in subsection (a) that refers to other sections of the Act to determine whether an increase or decrease in work disability is warranted.
>
> In summary, K.S.A. 44-528 provides a means for either the employer or employee to seek a modification of an award. Where the employee seeks a modification of work disability because of a subsequent wage loss, the work disability is calculated under K.S.A. 44-510e(a). In this case, Serratos' work disability increased because of a total wage loss. Under K.S.A. 44-528(a), the ALJ, and the Board on appeal, had the authority to modify the award "upon such terms as may be just" and "subject to the limitations" in the Act – K.S.A. 44-510e(a). Subsection (b) need not be considered under the circumstances.[32]

Serratos also noted the interrelationship between K.S.A. 44-528 and 44-510e was previously addressed in *Asay*,[33] which states, "The review and modification statute, K.S.A. 44-528, does not alter the test for determining compensable permanent partial general disability under K.S.A. 44-510e."[34]

In the present claim, the judge considered the evidence as required by K.S.A. 44-528 and denied claimant's request for a modification of the award because claimant was capable of earning the same or higher wages than he did at the time of the accident. However, following *Bergstrom* and *Serratos*, once claimant quit his job with respondent, he had a work disability as defined by K.S.A. 44-510e. His disability increased and he is entitled to greater permanent partial disability benefits.

As noted above, the Board has de novo review. While K.S.A. 44-528 states the judge may increase or not increase claimant's Award based on review and modification, the Board does not review a judge's ruling based on whether any abuse of judicial discretion occurred. Rather, the Board has as much discretion in awarding or declining to award benefits as did the judge. Based on the Board's de novo review, we conclude claimant has wage loss and the reason for his wage loss is irrelevant under K.S.A. 44-510e and *Bergstrom*. He is entitled to a work disability award.

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[32] *Serratos* at *6.

[33] *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421, *aff'd* 240 Kan. 52 (1986).

[34] *Id.* at 124-25.

Additionally, to adopt the judge's ruling would be to impose different legal standards upon two different classes of injured workers. The first class of injured workers are those who after being injured, but prior to an award being entered in their claim, sustained a wage loss of more than 10% of their pre-injury wages. Those injured workers would receive an award for work disability according to the formula set forth in K.S.A. 44-510e. The second class of injured workers are those who returned to work for 90% or more of their pre-injury wages, received an award based upon a functional impairment and later lost their employment or became employed at less than 90% of their pre-injury wages. The latter class of workers might not be entitled to an award based on having a work disability solely because the judge determined the worker was capable of earning comparable wages or because the judge, despite the increased work disability, opts to employ the permissive "may" language of K.S.A. 44-528 and simply decides to not modify the underlying award. Therefore, the Board grants claimant's request for a modification of his award. The next step is to utilize K.S.A. 44-510e to determine claimant's work disability.

Claimant's wage loss is 72%, the percentage difference between claimant's $815.43 average weekly wage and his current average weekly wage of $228.19.

Claimant had no permanent work restrictions as a result of his 2010 accidental injury until Dr. Fluter's December 12, 2012 report was completed. Claimant did not have such report until after he last worked for respondent. Dr. Fluter was not asked to give claimant any restrictions and did not provide claimant any permanent restrictions when he evaluated him in 2011. Dr. Bieri's report must be considered based on K.S.A. 44-516, even though such physician did not testify. Dr. Bieri saw no need for permanent work restrictions. Similarly, Dr. Stein observed no need for permanent work restrictions. Dr. Stein indicated at his deposition that claimant had no task loss as a result of his 2010 accidental injury.

The greater weight of the credible evidence is that claimant failed to prove the need for permanent work restrictions or task loss as a result of his 2010 accidental injury. He has a 0% task loss. Averaging claimant's 72% wage loss and 0% task loss results in a 36% work disability.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board reverses the January 17, 2014 Review and Modification Award and concludes claimant has a 36% work disability.

AWARD

WHEREFORE, the Board reverses the January 17, 2014 Review and Modification Award.

The claimant is entitled to 13.14 weeks of temporary total disability compensation at the rate of $376.18 per week or $4,943.01 followed by 20.75 weeks of permanent partial disability compensation at the rate of $376.18 per week or $7,805.74 for a 5% functional impairment followed by 2.43 weeks of permanent partial disability compensation at the rate of $376.18 per week or $914.12 for a 36% work disability followed by 126.22 weeks of permanent partial disability compensation at the rate of $543.65 per week or $68,619.50 for a 36% work disability, making a total award of $82,282.37.

As of July 2, 2014 there would be due and owing to the claimant 13.14 weeks of temporary total disability compensation at the rate of $376.18 per week in the sum of $4,943.01 plus 23.18 weeks of permanent partial disability compensation at the rate of $376.18 per week in the sum of $8,719.85 plus 78.29 weeks of permanent partial disability compensation at the rate of $543.65 per week in the sum of $42,562.36 for a total due and owing of $56,225.22, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $26,057.15 shall be paid at the rate of $543.65 per week for 47.93 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

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BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

K.S.A. 44-510e and K.S.A. 44-528 are incongruent. The former requires no analysis of a worker's wage earning capacity, while the latter specifically references exploration of the worker's ability to earn wages equal to or higher than at the time of the worker's accidental injury. Notwithstanding explanations as to why K.S.A. 44-510e "trumps" K.S.A. 44-528, the main issue presented forces a choice between two unambiguous statutes.

While believing the statutes conflict, the undersigned Board Member agrees with the above Board Members that claimant is entitled to review and modification of his original award and is entitled to permanent partial disability benefits based on a work disability. In connection with review and modification of an original award on the basis that a claimant is eligible for a work disability award, K.S.A. 44-510e must be used to calculate benefits.[35] K.S.A. 44-510e allows claimant to receive permanent partial disability benefits in excess of his functional impairment if he has wage loss exceeding 10%. Claimant met such requirement. *Bergstrom* makes it clear that the reason for a claimant's wage loss is irrelevant. Quite plainly, claimant has a work disability and is thus entitled to work disability benefits.

Respondent argues it is not "just" for claimant to receive a work disability award on review and modification. Respondent argues K.S.A. 44-510e and *Bergstrom* only apply to original awards and not to K.S.A. 44-528 review and modification proceedings. The Kansas Supreme Court has at least implied it is just for a claimant to receive a work disability award as part of an original proceeding, no matter the reason for the claimant's wage loss. While K.S.A. 44-510e and K.S.A. 44-528 have obviously different statutory language, this Board Member is hard-pressed to see why it would be impliedly just for a claimant to get a work disability – irrespective of earning capacity – when an original proceeding is determined under K.S.A. 44-510e, but not just to get the same result in a K.S.A. 44-528 post-award proceeding.

Additionally, *Serratos* and *Ramey* provide guidance on how to address the interplay between K.S.A. 44-510e and K.S.A. 44-528. Such unpublished Kansas Court of Appeals opinions are "not binding precedent," but may have "persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court." Such cases are persuasive for the general proposition that when a claimant is entitled to review and modification of an original award, benefits must be calculated under K.S.A. 44-510e.

Nonetheless, this Board Member's agreement with the majority result is with some hesitancy based on:

- concern that we are disregarding clear language in K.S.A. 44-528, to the point where we are compelling an award of work disability benefits in a review and modification proceeding, despite permissive and discretionary statutory language to the contrary;

- *Asay* is distinguishable; and

- disagreement with parts of the rationale in *Serratos* and *Ramey*.

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[35] See *Serratos* at *6; see also *Ramey v. Cessna Aircraft Co.*, No. 104,819, 2011 WL 4035762 at *6 (Kansas Court of Appeals unpublished opinion filed Sept. 9, 2011).

Regarding the first concern, particularized or specific statutes control over general statutes.[36] K.S.A. 44-528 specifically applies to review and modification proceedings. Granted, the language in K.S.A. 44-528 that an award for work disability on review and modification is "subject to the limitations provided in the workers compensation act" shows that when a work disability award is granted in a review and modification proceeding, it should be calculated as provided for in K.S.A. 44-510e. However, such conclusion does not erase from the statute books the fact that K.S.A. 44-528 – as literally written and without any ambiguity – requires determination of an employee's capability to earn wages.

If K.S.A. 44-510e supplants K.S.A. 44-528 and compels a work disability award in a review and modification proceeding, the plain wording of the review and modification statute is further eroded. Nothing in case law or statute compels a judge to award a work disability in a review and modification proceeding solely based on claimant's wage loss. K.S.A. 44-528 repeatedly uses the word "may" in defining the judge's authority under the statute, not "must" or "shall." However, the majority opinion could be viewed as removing all discretion from a judge. The plain language of K.S.A. 44-528 does not say a review and modification proceeding simply involves a judge carrying out a ministerial act of increasing a claimant's award. Rather, K.S.A. 44-528 uses "may" language that is "permissive" and "entirely permissive and discretionary"[37] and is not mandatory language, such as "shall." No known Kansas case has interpreted the word "may" as meaning "shall."[38]

This Board Member's second concern is that *Asay*, which is heavily relied upon in *Serratos* and *Ramey*, should not be viewed as binding precedent.

In *Asay*, such claimant was initially awarded a 50% permanent partial general disability. After he returned to work for another employer and was making more money, his award was reduced by the administrative law judge to a 25% permanent partial general disability. The district court judge canceled his award based on his increased earnings. The Court of Appeals reversed the cancellation and reinstated the 25% permanent partial general disability award.

The version of K.S.A. 44-510e cited in *Asay* is different than the statute applicable to this case. In *Asay*, K.S.A. 44-510e(a), stated in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced.

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[36] *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 195-96, 239 P.3d 66 (2010).

[37] *Ramey* at *3-4; see also *Serratos* at *5 (The K.S.A. 44-528 "may" language is "permissive.").

[38] *Ramey* at *3.

The version of K.S.A. 44-528(b) cited in *Asay* stated:

> If the director shall find that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident . . . the director may cancel the award and end the compensation.

At the time *Asay* was decided, K.S.A. 44-510e(a) looked at the worker's ability to engage in work of the same type and character as he or she had at the time of injury, while K.S.A. 44-528 looked at a worker's capability to earn. Both statutes were congruent in that they looked at ability or capability. The statutes applicable to this case are not congruent: the version of K.S.A. 44-510e applicable to this case does not require examination of a worker's ability to earn, but the applicable version of K.S.A. 44-528 still requires us to look at a worker's capability to earn. These statutes require different results. *Asay* does not say that any version of K.S.A. 44-510e "trumps" any version of K.S.A. 44-528. *Asay* does not require a court to ignore any statutory language in K.S.A. 44-528.

Asay also stated that where there is a conflict between two statutes that cannot be harmonized, the later legislative expression controls. Of note, *Asay* did not indicate there was an irreconcilable conflict between the applicable versions of K.S.A. 44-510e and K.S.A. 44-528. Rather, it appears the statutes were read *in pari materia* to reconcile and bring them into workable harmony: "We conclude then that a claimant is '*capable* of earning the same or higher wages' to justify cancellation of his award under K.S.A. 44–528(b) only if claimant has regained his 'ability . . . to engage in work of the same type and character that he was performing at the time of his injury.'"[39] Thus, Mr. Asay's capability to earn was still tied to his ability to engage in work of the same type and character performed at the time of injury. Even though Mr. Asay was earning higher wages, his award was not subject to cancellation because he did not regain the ability to perform his prior work and still had a 25% disability based on K.S.A. 44-510e(a). Whether Mr. Asay made more money did not impact his ongoing disability.

If we need to explore the latest expression of legislative intent, both K.S.A. 44-510e and K.S.A. 44-528 were amended in 1993. K.S.A. 1992 Supp. 44-510e had stated in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

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[39] *Asay*, 11 Kan. App. 2d at 126.

The relevant 1993 change to K.S.A. 44-510e was that:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The 1993 amendments to K.S.A. 44-528 substituted the phrase "administrative law judge" for references to the "director" of workers compensation. Otherwise, the statute was left unchanged in terms of allowing the finder of fact discretion in increasing, diminishing or cancelling an award, and the statute still required consideration of a worker's earning capability. K.S.A. 44-510e was also amended in 1996, but such amendments left in place the statutory language regarding computation of permanent partial general disability benefits. Therefore, even if we have to look at the most recent expression of legislative intent, we have different standards imposed in 1993. The work disability standard says nothing about earning capacity, while the review and modification standard explicitly still requires analyzing earning capacity.

Finally, in *Asay*, the Court was proceeding under the old standard of liberal construction of the Act to award compensation where it is reasonably possible to do so.[40] That case law standard was changed by the legislature in 1987 to require a liberal construction of the statute to bring employers and employees within the provisions of the Act, but to then apply the provisions of the Act impartially to both.[41]

This Board Member's third reservation in a wholehearted agreement with the above Board Members is based on disagreement with part of the rationale underlying *Serratos* and *Ramey*. In both cases, the judge and the Board awarded work disability benefits to the respective claimants. This case is different because the judge did not already determine claimant was entitled to review and modification of his award.

Serratos and *Ramey* state that K.S.A. 44-528(b) only applies to an employer's application for review and modification because no claimant would ask for a reduction or cancellation of his or her award. While this Board Member agrees no claimant would seek such result, the plain language of section (b) says nothing about an employer filing for review and modification, let alone that the power of the judge under that subsection only applies if the employer seeks review and modification. Rather, K.S.A. 44-528(a) states that

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[40] *Id*.

[41] K.S.A. 44-501(g).

an application for review and modification may be filed by an employee, employer, dependent, insurance carrier or any interested party. K.S.A. 44-528(b) says nothing about who may file an application for review and modification. Only section (a) of the statute concerns what party may file for review and modification. The entire statute, including section (a) and section (b), concern the judge's authority. Under both sections (a) and (b), the judge may increase or diminish the claimant's compensation.

The concept that K.S.A. 44-528(b) does not apply unless the employer files its own application for review and modification runs counter to the K.S.A. 44-523 mandate that the director, administrative law judge and Board are not bound by technical rules of procedure.

If *Serratos* and *Ramey* are followed to the conclusion that a result favorable to an employer is never within reach unless the employer independently files an application for review and modification, the claimant basically has sanctuary for any self-filed application for review and modification. This result is different from other areas of workers compensation law. In actual practice, any party can file an application for a regular or preliminary hearing and be subject to the judge's ruling, perhaps even an unfavorable ruling, without regard to which party files the application. Whether a party gets what it wants or is subject to an adverse decision is not dependent on which party files the application. The entire law, not selected snippets of the law, apply no matter which party files the application. For instance, if a claimant filed applications for preliminary and regular hearings, would the employer need to file separate applications to assert affirmative defenses that might defeat compensability? No. The proposition that the law varies depending on who files a piece of paper adds nonexistent language to the written law.

This Board Member has other concerns about *Serratos*. Such case notes it is unclear how to apply the abilities test in K.S.A. 44-528(b). However, an ability to earn test was also part of our law prior to the 1993 amendments.[42] An abilities test based on earning capacity was read into the law under *Foulk*[43] and remained alive and well until *Bergstrom*.

Despite the aforementioned concerns, *Serratos* and *Ramey* indicate a claimant who is eligible for work disability benefits in a review and modification proceeding should have his or her benefits calculated based on K.S.A. 44-510e. *Bergstrom* indicates that the reason for a claimant's wage loss is irrelevant in determining a work disability award. It makes little sense to have one standard for awarding permanent partial disability benefits following a K.S.A. 44-523 hearing and have a different standard for a K.S.A. 44-528 hearing. As such, this Board Member concurs with the above Board Members.

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[42] See *Hughes v. Inland Container Corp.*, 247 Kan. 407, 422, 799 P.2d 1011 (1990).

[43] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994).

Finally, this Board Member agrees with the majority's other conclusions. This Board Member emphasizes that the Board's review of an administrative law judge's decision is not based on whether the judge committed an abuse of discretion. As noted by the majority, the Board has de novo review of the agency record. This Board Member agrees with the majority's determination of claimant's average weekly wage, post-injury average weekly wage and his work disability award.

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BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the award of the majority. K.S.A. 44-528 is specific in directing the method of determining whether a modification of an award is proper. The statute requires a determination of an employee's capability to earn equal or greater wages than that being earned at the time of the accident. *Bergstrom*[44] is quite clear that the Court's obligation is to give effect only to express statutory language, rather than speculating on what the law should or should not be. The Court of Appeals discussed *Bergstrom* in *Tyler*[45] and noted"[j]udicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[46]

The legislative intent contained in K.S.A. 44-528 requires a determination as to whether a claimant is capable of earning the same or higher wages as those being earned on the date of accident. Here, claimant has the demonstrated ability to perform his job with respondent, earning the same wages and receiving the same fringe benefits. The only thing preventing this result was his voluntary resignation. Claimant's earning "capability" is not in dispute. He had returned to work with respondent earning a comparable wage.

Even under *Asay*[47] cited by the majority, this claimant retains the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[48] Additionally, the version of K.S.A. 44-510e in effect at the time of the *Asay* decision is decidedly different from the current version of the statute. In 1986, the

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[44] *Bergstrom, supra.*

[45] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[46] *Id.* at 391.

[47] *Asay*, *supra.*

[48] *Id.* at Syl. ¶ 4.

legislative mandate was to determine "the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced . . . ." In 1993, this language was changed to the current version requiring an average of the wage loss and task loss suffered by the employee. This represented a major modification of K.S.A. 44-510e. Of note, K.S.A. 44-528 was also modified in 1993 to allow a determination by the ALJ, rather than the director, of the employee's capacity to earn the same or higher wages than the employee did at the time of the accident. The specific language regarding the employee's ability to earn the same or greater wages with either the respondent at the time of the accident, or from any trade or employment, was allowed to remain. Had the legislature intended for K.S.A. 44-510e to "trump" K.S.A. 44-528, the perfect time to do so would have been with the 1993 modifications of both statutes. The fact that the legislature allowed the language in K.S.A. 44-528 to remain should send a strong signal to the courts of Kansas as to its "intent."

Additionally, as noted in the concurring opinion, in *Asay*, the court was proceeding under the old standard of the liberal construction of the Workers Compensation Act to award compensation where it is reasonably possible to do so. Such judicial commitment was legislatively eliminated in a 1987 amendment to the Act.

The majority cites *Bergstrom* in support of its position that the plain language of K.S.A. 44-510e outweighs that of K.S.A. 44-528. The Supreme Court, in *Bergstrom*, identifies as a "most fundamental rule of statutory construction" the intent of the legislature governs if that intent can be ascertained.[49] Here, the specific language of K.S.A. 44-528 is clear. It has been allowed to remain intact for decades, while K.S.A. 44-510e has been modified multiple times. It is hard to imagine a more clear legislative intent.

The majority argues the dissent's position would result in an inequitable treatment of workers who suffer a job loss before an award versus after an award has been entered. The possibility of differing results with similarly situated claimants may be the result, with that outcome being arguably inappropriate. The fact that a legislatively created statute may result in inappropriate or even ludicrous results is not controlling. In *Saylor*,[50] the Kansas Court of Appeals allowed a date of accident, determined under K.S.A. 44-508(d), to occur while an injured claimant was home recuperating from knee surgery. How inappropriate to allow a date of accident to occur weeks or even months after an employee ends his or her employment. Nevertheless, that is exactly the result with the pre-May 15, 2011 K.S.A. 44-508(d) and the date of accident determinations when dealing with micro-trauma injuries. The change from the original bright-line rule of the last day worked[51] to the

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[49] *Bergstrom* at 607.

[50] *Saylor v. Westar Energy, Inc,* 41 Kan. App.2d 1042, 207 P.3d 275 (2009), *aff'd* 292 Kan. 610, 256 P.3d 828 (2011).

[51] *Kimbrough v University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

express language of K.S.A. 44-508(d) created a presumption that the legislature intended to change the date of injury determination. As noted in *Saylor*, legislative intent as expressed in the language of the statute controls. In this instance, the legislature's determination that the language of K.S.A. 44-528 should remain unchanged displays its clear intent.

Here, claimant maintained his job with respondent and resigned on his own accord. He had the ability to earn the same wages and receive the same fringe benefits. But for claimant's voluntary actions, he still has the same earning capability. The judge's decision to exercise his permissive authority to not grant modification of the award was within his power. While the Board has de novo review and the standard of our review is not based on whether the judge abused his discretion, this Board Member agrees the judge's denial of review and modification was proper.

The very specific language of K.S.A. 44-528 should apply to this matter and claimant should be found to have retained the capacity to earn the same or higher wages as were being earned at the time of the accident. Claimant should be limited to his functional impairment pursuant to K.S.A. 44-528 and denied additional permanent partial general disability under K.S.A. 44-510e.

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BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the Order of the majority. The undersigned Board Member specifically disagrees with the majority's finding that, because claimant has a wage loss, we are required by *Bergstrom* to award work disability. If this were an original proceeding under K.S.A. 44-523, the undersigned Board Member would agree with the majority. However, the majority fails to recognize the obligation of the ALJ, and the Board through de novo review, to consider, inter alia, claimant's post-award earning capacity prior to exercising the discretion to allow modification of a prior award.

The ALJ correctly exercised his discretion to deny modification of the underlying award. First and foremost, in an Application for Review and Modification, the ALJ and the Board must review the factors listed in K.S.A. 2009 Supp. 44-528 to determine if a modification of a prior award is appropriate. In order to get to the disability analysis under K.S.A. 44-510e, the Board and the ALJ must first review the Application for Review and Modification utilizing the analysis required by K.S.A. 44-528 and then exercise the discretion to allow or disallow review.

K.A.R. 51-19-1, which expands the procedural requirements for pursuing review and modification, states:

> (a) When there has been an application for review or appeal upon an award and the same is either affirmed or modified, application for review and modification pursuant to K.S.A. 44-528 may still be made to the division. Initial hearings on such applications shall be conducted by an administrative law judge.
>
> (b) Application for review and modification pursuant to K.S.A. 44-528 shall set forth at least one of the reasons contained therein.
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> (c) Review and modification applications should not be made more than once during any six-month interval except in highly unusual situations. However, upon the completion of vocational rehabilitation, as provided for under this act, the worker, employer, or insurance carrier shall have the right to seek a review and modification of the award rendered, granting any compensation to the employee for any disability.

Without K.S.A. 44-528 and the procedural requirements and limitations set forth in K.A.R. 51-19-1, no review of a prior award can be made. K.S.A. 44-510e does not contain the procedural right to post-award review. Only through K.A.R. 51-19-1 and K.S.A. 44-528 may an award be reviewed and discretion granted to allow permanent partial general disability under K.S.A. 44-510e. The Kansas Workers Compensation Act contains no language stating if a person meets the requirements for permanent partial general disability under K.S.A. 44-510e, the ALJ and Board relinquish the discretion to deny modification under K.S.A. 44-528.

K.S.A. 44-528(a) requires a review of whether the "award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished." K.S.A. 44-528(b) requires a review of whether "the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident."

The elements of review contained in K.S.A. 44-528(b) allow an ALJ and the Board to deny review of a claim if an employee is capable of earning the same or higher wages with the same or another employer. The ALJ, in his Award, stated:

> The Supreme Court of the State of Kansas in *Bergstrom v. Spears Manufacturing*, 289 Kan. 605, at syllabus 1 states:

> *"When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction."*
>
> This Court finds that the language of K.S.A. 44-528 is plain and unambiguous. It refers specifically to the authority an administrative law judge has when an application for review and modification has been filed under this section.

The undersigned Board Member agrees with the ALJ. In order to get to the disability analysis under K.S.A. 44-510e, the Board and the ALJ must first review the Application for Review and Modification under K.S.A. 44-528 and exercise the discretion to allow or disallow modification of a prior award. The ALJ's decision not to allow modification of the prior award is supported by the evidence, which shows claimant is earning or is capable of earning the same or higher wages as at the time of the accident. Denial of review is appropriate in this case.

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